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EX PARTE OR LATE FILED

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Gulf of Mexico Cellular Rule Making
WT Docket No. 97-112; CC Docket No. 90-6

Dear Ms. Salas:

On behalf of Petroleum Communications, Inc. ("PetroCom"), this letter is a written ex parte presentation submitted in the referenced docket regarding proposed rule changes for cellular radio systems operating in and near the Gulf of Mexico. The specific issue we address here is whether, and to what extent, the Commission should grandfather the existing operating parameters of such systems.[1]

To place this discussion in context, following the 1994 court remand, the "status quo" rule for Gulf carriers has permitted a 39 dbu contour at the coastline boundary.[2] The PetroCom/US Cellular proposal in this rule making would replace a 39 dbu contour with a 32 dbu contour rule for the Gulf carriers, i.e., the same signal strength rule for both land and Gulf carriers with no "move it you lose it" rule for Gulf carriers.[3] Further, there should be no change to the Commission's de minimis extension rule, as PetroCom has previously demonstrated.[4]

During the 4-year course of this rule making, there have been, with one exception, no major disputes

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[1]This grandfathering issue is not addressed in the docket's Second Further Notice of Proposed Rule Making ("*Second FNPRM*").

[2]The 28 dbu contour rule for Gulf carriers was vacated along with the "move it you lose it" rule that defined a Gulf carrier's CGSA by Service Area Bounday (SAB) contours. The CGSA of a Gulf carrier presently is that existing as of January 11, 1993. *See* "note" to Section 22.911(a). PetroCom, the A-side Gulf carrier, has performed engineering based on 39 dbu contours. PetroCom understands that Bachow Coastel, LLC, the B-side Gulf carrier, agrees that the status quo permits Gulf carriers to have 39 dbu contours at the coastline boundary.

[3]The 32 dbu signal strength rule is Point 1 of the PetroCom/US Cellular proposal. *See* "Ex Parte Submission Of Revised Proposal Of Petroleum Communications, Inc. And U.S. Cellular Corporation" filed on August 29, 2001.

[4]*See* PetroCom's September 24, 2001 ex parte presentation in this docket.

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between land and Gulf carriers. The exception, the Bachow Coastel/Alltel dispute, has been settled. If other problems with a carrier's signal contours worth complaining about existed at the time the rule making began, one can reasonably conclude they should have been voiced by now. In the interest of avoiding service disruptions and litigation over new rules the agency adopts, the Commission should adopt a grandfathering rule that preserves the current operating parameters of systems operating in the Gulf, including contour extensions across the coastline boundary.[5] What type of grandfathering the Commission should adopt is addressed in further detail below.

Grandfathering, in the first instance, should mean grandfathering the operating parameters, as reported to the FCC, of all regularly licensed facilities existing as of April 16, 1997, the release date of the *Second FNPRM*.[6] This date is reasonable given that parties were on notice as of that date that the technical rules could be changing for systems in and near the Gulf. The grandfathered operations of such facilities would include all cross-boundary extensions, de minimis and non de minimis alike.

Under our proposed grandfathering rule, a carrier could modify or build a new site as long as the new cross-boundary extensions of the 32 dbu contour remain within the extension of the 32 dbu contour of the originally grandfathered operations.[7] In other words, a cross-boundary extension of a new or modified site would be grandfathered only to the extent it is contained within the originally grandfathered 32 dbu contour. Any portion of an originally grandfathered extension not within the 32 dbu contour of the new or modified site would lose its grandfathered status.

The operating parameters of sites established by co-location agreements should only be grandfathered for the term of each agreement or extension. Co-located sites thus should be "co-grandfathered" in tandem: if one carrier loses grandfathering rights by expiration or termination of the co-location agreement, the other carrier also loses its grandfathering rights for the co-located sites. This rule is logical since each carrier's extension is based on the co-location agreement. If the co-location agreement expires or terminates, so should the extension.

Grandfathering the operating parameters of regularly licensed facilities as of April 16, 1997 would help avoid pull back scenarios that could cause needless service disruptions. The main purpose of a grandfathering rule should be to allow the status quo that has been in place for the last four years to continue, including contour extensions (de minimis and non de minimis alike) for which there has been at least implicit consent during that time. Land carriers expressed concern over existing extensions into the Gulf and the potential for

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[5]However, the Commission should not change the boundary consent rules themselves, for example by permitting non consensual de minimis extensions into a Gulf carrier's CGSA, because such a change will undermine co-location agreements.

[6]Facilities operating under special temporary authority (STA) would not be grandfathered. However, under the PetroCom/US Cellular proposal for a 10-mile boundary extension on the Florida side of the Gulf, facilities presently operated under STA by land carriers along the Florida coast could become regularly licensed without the Gulf carrier's consent. By its terms, the April 16, 1997 grandfathering rule would not apply to these (or any) new regularly-licensed facilities.

[7]The 32 dbu contour was chosen for this purpose consistent with the equal signal strength rule of 32 dbu presented as Point 1 of the PetroCom/US Cellular proposal.

litigation from enforcing status quo rules.[8] Grandfathering could prevent that, thus eliminating such concerns.[9]

Grandfathering existing operations, while maintaining the status quo CGSA definition for Gulf carriers as well as the status quo de minimis extension rule (barring extensions into an adjacent CGSA absent consent), best ensures seamless coverage in the Gulf, provides incentives for co-location agreements, and thus provides the best regulatory regime for minimizing disruption to service.

PetroCom takes this opportunity to reiterate that the PetroCom/US Cellular proposal remains the best alternative for the Commission to adopt in this rule making and best satisfies Regulatory Flexibility Act requirements. PetroCom emphasizes, however, that the compromise reflected in the joint proposal is a "package deal." PetroCom has made a good faith effort to work cooperatively with the Commission and other parties to reach a consensus, but it must reserve positions it took prior to making the joint proposal in the event that the joint proposal is not adopted *in toto*.[10]

In this regard, much has been said about the difference between the Western and Florida sides of the Gulf in terms of Gulf carrier infrastructure. Upon close examination of the record in this docket, however, one can easily conclude that no problem really exists anywhere in the Gulf in terms of coverage or service to customers, and the current status quo rules and boundary work as well on the Florida side as they do on the Western side of the Gulf. Co-location agreements have been reached on both sides of the Gulf. In short, arguments can be made for not changing the rules at all anywhere in the Gulf. However, in the spirit of a good faith compromise, PetroCom's joint proposal with US Cellular is a way of resolving the issues that accommodates both sides.

No legitimate criticism has been made against the PetroCom/US Cellular proposal by any party. Indeed, the proposal *in toto* is eminently generous to land carriers by extending the Florida boundary by 10 miles, equalizing the signal strength rule to 32 dbu for both sides, and keeping the status quo CGSA definition and extension rules in place. However, PetroCom would lose the substantial benefits of this compromise if, for example, there is a 10-mile boundary extension but the 32 dbu equal signal strength rule is not adopted, or changes are made to the boundary consent rule to permit de minimis extensions into PetroCom's CGSA without consent, thus undermining co-location agreements.[11]

In sum, the Commission should adopt a grandfathering rule in this proceeding that:

- Grandfathers the operating parameters, as reported to the Commission, of all facilities operating as of April 16, 1997, including all cross-boundary extensions;

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[8]*See*, e.g., Alltel's February 27, 2001 ex parte filing at p. 11 (expressing concern over non-consensual SAB contour overlaps into the Gulf) and p. 8, 15 (expressing concern over litigation if current rules stay in place). No details were provided that back up such concerns. *See* PetroCom's April 27, 2001 ex parte filing, p. 5.

[9]The grandfathering proposed would be consistent with the Commission's previous actions in the unserved area rulemaking that made a switch from a 39 dbu formula to a 32 dbu formula for defining SAB contours. In doing so, the Commission stated, "[a]ny new service area boundary extensions created solely by this change are considered de minimis and are hereby authorized." *See* 7 FCC Rcd 2449 at ¶13, n. 35.

[10]*See* PetroCom's comments filed on May 15, 2000.

[11]*See* PetroCom's September 24, 2001 ex parte letter.

- Continues grandfathering for new or modified sites only to the extent that the 32 dbu contours produced by such operating parameters remains wholly within grandfathered contour extensions; and

- For sites operated pursuant to co-location agreements, "co-grandfathers" extensions of co-located sites only for the term of the co-location agreement, including renewals thereof.

Such a grandfathering rule should be accompanied by an equal signal strength 32 dbu contour rule with no change to either: (1) the current definition of Gulf carriers' CGSAs or (2) the current boundary consent rules that prohibit extensions (including de minimis extensions) into the CGSA of an adjacent licensee.

Alltel Communications, Inc.'s October 10, 2001 written ex parte presentation took issue with the status quo rules permitting Gulf carriers a 39 dbu signal strength at the coastline boundary. Alltel overlooks that the 28 dbu formula was proposed at a time Gulf carriers' CGSAs were to be defined by SAB contours. The 28 dbu formula was a means for providing Gulf carriers with greater protection for their authorized service territory than that afforded by the 39 or 32 dbu formula. As a matter of law, the 28 dbu formula was eliminated with the elimination of the new CGSA definition for Gulf carriers. Ultimately, the relevant issue is not what the status quo contour rule is, but what it should be in the future. PetroCom is not advocating that the new rules should give it a stronger signal strength that what land carriers have been given. Rather, PetroCom and US Cellular have proposed an equal signal strength rule – the same rule that applies between adjacent land systems – in a scenario where there is no "move it you lose it" rule defining the Gulf carrier's CGSA.

The record does not support Alltel's contention that terrain obstructions on land compromise service to customers. Instead, the best record evidence shows: (1) that the land carriers' signals are virtually always stronger than Gulf carriers' signals along the coastline;[12] and (2) there are no coverage gaps or significant customer complaints with respect to land carriers' service.[13]

In connection with the Commission's Coastal Zone proposal, the *Second FNPRM* acknowledged the potential need for a "hybrid" formula that would account for signals over water coming from land based sites.[14] The record in this proceeding includes examples of land carriers' "alternative propagation studies" that show actual, reliable service from land sites extending seaward into the Gulf substantially further than what is predicted by the 32 dbu contour formula.[15] Just as a building does not create a shadow that extends miles to the horizon, or that somehow weakens the sunlight shining beyond the building's shadow, a building along the coastline will not prevent signals from reaching Gulf waters altogether or weaken all of the signals that do.

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[12] *See* Engineer Report by Tom L. Dennis ("Dennis Study"), Attachment 3 to PetroCom's January 10, 2001 ex parte submission; *See also* PetroCom's April 27, 2001 submission at pp. 3-7 (addressing Alltel's arguments with the Dennis Study).

[13] *See* Attachment 1 to PetroCom's January 10, 2001 ex parte submission (Summary of Record Evidence). Alltel's assertion that there are "immediate and critical service deficiencies" along the Florida coast is unsupported by the record.

[14] *Second FNPRM* at ¶¶37-38.

[15] *See* Exhibit 1 to PetroCom's January 22, 1998 ex parte filing.

Once over water, signals travel further. Final rules allowing land carriers to have a signal strength advantage over the Gulf carriers at the coastline would not find support in the record, and would be inconsistent with the equal signal strength rule for land-based systems.

It deserves emphasizing that, from the Gulf carrier's perspective, the 28 dbu contour formula provided more protection for their CGSAs under the "move it you lose it" regime than that provided by the 32 dbu formula. Now that that regime has been vacated by the court, re-adopting the 28 dbu formula for Gulf carriers makes no sense. Even assuming a Gulf carrier's 28 dbu contour might define "reliable service," it can be overpowered by the stronger 32 dbu contour of the land carrier, a contour capable of extending much further seaward than the formula predicts. There is no reason why the final rules adopted in this proceeding should give land carriers such a signal strength advantage.

Alltel's claim that the PetroCom/US Cellular proposal would upset agreements recently reached in the Gulf at the expense of the land carriers likewise is unsupported. Indeed, Alltel's (now abandoned) "neutral zone" proposal contained the same equal 32 dbu signal strength provision contained in the PetroCom/US Cellular proposal. Alltel has failed to back up its claim that an equal 32 dbu signal strength rule – the same rule land carriers must follow on land and included in its own proposal – will work any disadvantage to land carriers in the Gulf.

Sincerely,

Richard S. Myers

cc: David Furth
Roger Noel
Linda Chang
Michael Ferrante
Office of Advocacy, Small Business Administration